IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL REVISION APPLICATION No.305 of 2007

WITH

CRIMINAL APPLICATION No. 199 of 2007

Rocky D'Souza ..Applicant.

Vs.

The State of Maharashtra
& Anr. ..Respondents.

Mr C. K. Pendse with Vinod Singh for the Applicant.

Ms M.H. Mhatre, APP for the Respondent No.1.

None for the Respondent No.2.

CORAM: V.C. DAGA,J.

DATED: 16TH JULY, 2007.

P.C.:-

1. Heard learned counsel appearing for the applicant and learned APP for the respondent no.1- State of Maharashtra. None for the respondent no.2.

2. Perused revision petition with documents annexed thereto.

3. The applicant has invoked revisional jurisdiction of this Court to challenge the order dated 12.1.2006 passed in Criminal Case No. 1080/SS/2005 (Old No. 743/S/2003) by the Metropolitan Magistrate (50th Court) Vikroli,

Mumbai, convicting the applicant-accused for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short "the N.I.Act") to suffer S.I. for three months and to pay a fine of Rs.1,000/-,in default to suffer S.I. for 15 days. The compensation in the sum of Rs. 8,50,000/- was awarded in favour of the complainant - respondent No.2. The said order was confirmed in Criminal Appeal No. 139/06 vide the order dated 5.7.2007 by the learned Sessions Judge, Greater Mumbai for the reasons recorded therein.

THE FACTS:
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4. The facts as per complainant are as under:-

5. On 6.3.2003 the accused approached him and requested for advancing friendly loan. He assured that he would return the amount immediately or else he would make the complainant as a partner in his business (i.e. "M/s. Savio Engg. Works") which is being run at Nasik. On the above representation the complainant advanced a sum of Rs. 8,20,000/- to the accused. On 1.7.2003 and 2.7.2003 the accused issued in favour of the complainant

two cheques, one bearing No. 725480 drawn on Bank of Maharashtra, Vile Parle Branch for a sum of Rs. 4,00,000/- and another bearing No. 725482 drawn on the same bank in the sum of Rs. 4,20,000/-. The accused could not make the complainant as a partner in his business. Hence on 8.9.2003 the complainant had presented the cheques for encashment. However, both the cheques were dishonoured for the reasons "Exceeds Arrangement" by the bankers of the accused. On 17.9.2003 the complainant sent demand notice claiming the cheque amount. According to him, it was duly received by the accused but the accused did not make the payment. Hence subject complaint came to be filed.

6. The complainant was permitted to adduce the evidence.

THE ISSUE:

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7. On the basis of the evidence the question, tried by both the courts below was: whether the cheques in dispute issued by the accused-applicant in favour of the complainant were towards discharge of debt or liability?.

FINDINGS OF COURTS BELOW:

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8. Both the Courts below recorded their findings of fact in favour of the complainant and convicted the applicant-accused as stated hereinabove for the offence committed under Section 138 of the N. I. Act.

SUBMISSIONS:
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9. The learned counsel appearing for the applicant-accused urged that the complainant could not prove that he had moneys to advance. That he could not prove withdrawals from either of his bank accounts. He further urged that the moneys allegedly advanced by the complainant was never disclosed by him in his Income-tax Return. Hence debt was not legally enforceable. Reliance is placed on the judgment of the learned Single Judge of this Court in the case of **Vasudeo vs. Vilas 2006 (2) Bom. C. R. (Cri)1.** He, thus, submits that the complainant has failed to establish that the cheques were issued by the accused in discharge of legally enforceable liability. He also tried to rely upon some contradictions in the story of the complainant-respondent no.2 and went on to urge that the cheques were forcibly taken by the complainant from the accused. He, thus, submits that findings of both the courts below are perverse and liable

to be set aside.

10. Per contra, learned APP appearing for the State sought to support orders passed by the courts below contending that debt was very much enforceable at law. It was acknowledged by the applicant-accused by issuing subject cheques. He further submits that taking into account the defence taken by the complainant himself, the liability has not only been proved beyond doubt but the same has been admitted by the applicant-accused in his evidence.

CONSIDERATION

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11. Having heard rival parties and having taken into account the findings recorded by both the courts below in the light of the evidence adduced, it is not in dispute that the borrowings made by the accused-applicant are evidenced by the pronote executed by him in favour of the complainant.

12. It is also not in dispute that the accused has been borrowing moneys from the complainant. He has admitted that in the past he had borrowed money from the complainant.The accused in his statement under Section 313 of the Cr.P.C.has admitted that he had borrowed

Rs.2 lac from the complainant as a friendly loan, and had repaid Rs. 75,000/- by cheque and balance amount in monthly instalments of Rs. 20,000/- to 25,000/- each. That is how he claims to have repaid entire amount borrowed in the past with interest. He has also admitted that he did not take any receipt evidencing the repayments made. It is, thus, clear that both were operating on mutual faith and understanding looking to their friendly relations.

13. The accused has also admitted that he had given two cheques of Rs. 1 lac each to the complainant. In the cross-examination he has deposed as under:-

> "Myself and complainant are friends for eight years. I was in visiting terms to house of the accused. I got my factory at Musalgaon MIDC. We were having monetary transaction. It is not correct to say that I told the accused that I wanted to purchase new machinery. It is not correct to say that I told my need of money. It is not correct to say that I called him at Nashik and took amount of Rs. 8,28,000/- as a hand loan. It is not correct to say that I assured him that I will make him a partner. However, lateron I called him to Nashik to pay back the amount and gave these two cheques. I received demand notice sent at my Santacruz address. Lateron I read the notice. I did not reply the notice. It is not correct to say that I am deposing falsely that accused took two blank signed cheques from me."
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> (Emphasis supplied)

14. Perusal of the aforesaid piece of

evidence would go to show that the applicant has admitted that the complainant was called at Nashik and cheques in question were handed over by him to the complainant at Nashik. On the top of it, the accused-applicant inspite of the receipt of the demand notice did not reply the same. It is needless to mention that person, who did not borrow money, is expected to immediately re-act to deny his liability. Nobody will keep mum if the false demand is made by anybody.

15. The learned counsel for the applicant tried to rely on the unproved bank statements, which in law cannot be read.

16. The reliance placed on **Vasudeo vs Vilas (supra)** is misplaced. Non-disclosure of the amount in the income-tax return and books of account was taken into account as one of the factors to accept the defence as probable which was set up by the accused in that case. In this case, the admission given by the accused, itself, is sufficient to discard his defence. Under these circumstances, no fault can be found with the view taken by the Courts below.

17. The Courts below have appreciated the

evidence in detail and given detailed reasons in support of their findings. The view taken by the them is a reasonable and possible view. No fault in the appreciation of evidence could be demonstrated by the learned counsel for the applicant.

18. This Court not being a Court of appeal cannot substitute its own view in exercise of revisional jurisdiction. Revisional jurisdiction is not only limited in scope but also it is discretionary. The Court interferes in the revisional jurisdiction only in exceptional cases of flagrant miscarriage of justice as held by Apex Court in the case of **State of Rajasthan v. Gurucharandas Chaddha, AIR 1979 SC 1895.**

19. In the above view of the matter, no case is made out to interfere with the impugned orders. In the result, the revision application has no merit. Same is accordingly dismissed with no order as to costs.

20. Criminal Application No. 199 of 2007 also stands disposed of.

[V.C.DAGA,J]